IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1178

KENT MILNER, d/b/a BELVEDERE DRIVING SCHOOL, ET AL.,

Petitioners,

v.

COLONEL R. H. BURSON, DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Respondents.

PETITIONERS' RESPONSE TO MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

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IN THE

Supreme Court of the United States

No. 72-1172

KENT MILNER, d/b/a BELVEDERE DRIVING SCHOOL, ET AL.,

Petitioners,

v.

COLONEL R. H. BURSON, DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Respondents.

PETITIONERS' RESPONSE TO MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

Petitioners in the above-styled case file this their response to show this Court that this cause is in no wise moot and this Court should issue a writ of certiorari as prayed in their petition heretofore filed.

Without question, the 1973 Amendment to the Driver Training School License Act of Georgia provides an alternative to the formal education requirement provisions of the Act, but the educational requirement provisions of the Act are not directly involved in any

question before this Court. As petitioners view this case, the Act has been held facially constitutional by the three judge District Court panel and the facial constitutionality of the Act is no longer in question. What is in question is the constitutionality of the Act as applied by the enforcement agencies of the State of Georgia against these petitioners and the procedures applied by the District Court in this case vis-a-vis 28 U.S.C. Section 2283 as construed in *Younger v. Harris*, 401 U. S. 37 (1971) and related cases.

Stated another way, the 1973 amendment to the Act changed the prerequisites of qualification for driver training instructor licenses, not the *requirement* for a license and the constitutional question squarely involved here is discrimination in applying the requirement of a license, not the prerequisite for licensing. Section 2 of the Act (petitioner's Appendix 2D) requiring the license is untouched by the 1973 Amendment.

Admittedly, this Court should not pass upon the procedural aspects of this case if its substance is gone and there remains no real case or controversy. Such is not the case here and the substantive controversy is very much alive. Petitioners asked the trial court to determine whether or not the criminal provisions of the Act could be applied to petitioners while teachers of driver education in the public schools were immune from prosecution, and that court held this could not be done. Thus, regardless of what the educational requirements or alternatives may be, the fundamental substantive question of discriminatory application of the criminal provisions of the Act is untouched by the 1973 Amendment.

Petitioners are unable to see into the future and

know exactly how the enforcement agencies of the State of Georgia will apply the license requirements of the Act against them. Obviously, the case is bottomed on facts proved at the evidentiary hearing and those facts were sufficient to convince the trial judge that the criminal provisions of the Act were being applied unconstitutionally. The potential for unconstitutional application of the Act as amended is no less present if not identical, to its application before the 1973 Amendment and this is the foundation of petitioners' complaint against the respondent.

More basically, these petitioners are seeking to have the decision of the Fifth Circuit Court of Appeals reviewed on that Court's application of 28 U.S.C. Section 2283 to these facts; i.e., facts proved before the Act in question was amended. Nothing in the 1973 Amendment changes those facts and, obviously, the Amendment is totally ineffective so far as the application of Title 28 U.S.C. Section 2283 is concerned.

The cause is alive; as alive now as it ever was. This Court should not consider respondents' Memorandum in making its determination to grant Certiorari in this cause.

Respectfully submitted,

WESTMORELAND, HALL, BRYAN, McGEE & WARNER

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PROOF OF SERVICE

I, JOHN L. WESTMORELAND, JR., one of the attorneys for Kent Milner, d/b/a Belvedere Driving School, et al., petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of April, 1973, I served copies of the foregoing Petitioners' Response to Memorandum of Respondents Suggesting that the Cause is Moot on the several parties thereto, as follows:

(1) On Col. R. H. Burson, Director of Georgia Department of Public Safety, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Dorothy T. Beasley, 132 State Judicial Building, 40 Capitol Square, N.W., Atlanta, Georgia 30334.

(2) On Hinson McAuliffe, Solictor of the Criminal Court of Fulton County, by mailing three copies in a duly addressed envelope, with first class postage prepaid to Hinson McAuliffe, 53 Civil-Criminal Courthouse, 160 Broad Street, S.W., Atlanta, Georgia 30303.

(3) On Herbert T. Jenkins, Chief of Police, City of Atlanta, Georgia, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Henry L. Bowden, 2614 First National Bank Building, Atlanta, Georgia 30303.

(4) On J. B. Angelo Crowe, Driver Training Consultant, State Board of Education, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Dorothy T.

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